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SUGHRUE MION, PLLC
2100 PENNSYLVANIA AVENUE, N.W.
SUITE 800
WASHINGTON, DC 20037

EXAMINER	
BADR, HAMID R	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action

The after final amendment filed on 01/05/2009 is acknowledged. The amendment has been entered.

Response to Arguments

1. Applicant argues that whole milk is not one of the recited protein materials of claim 1.

a. Please refer to rejections under R1 and R5 of the office action mailed 9/5/08 to see that protein hydrolysates as presently claimed are disclosed. R1 and R5 do not disclose whole milk.

2. Applicant argues that combination of citric acid, gluconic acid and phosphoric acid is not taught by the references.

a. R2 teaches of using citric and phosphoric acids and R3 teaches of using gluconic acid. Additionally R3 discloses the concept of combining acids. It is obvious to the skilled in the art that combination of acids can be used. It is also noted that phosphoric acid can be used as a pH adjusting acid as well as an acidulant which affects the organoleptic quality of beverages.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

3. Applicants' argue that the present invention provides unexpectedly superior results and that the gel beverage comprising the acid components shows high heat resistance.

a. However, the data in this case is not persuasive for the following reasons. Applicants point to Tables 7 and 8 of the present specification which compares beverage within the scope of the present claims with beverage outside the scope of the present claims, i.e. comprising no gluconic acid or phosphoric acid. It is shown that the presently claimed beverage is superior in terms of heat resistance. However, the data is not persuasive given that there is only data at one value of each of the claimed ingredients and therefore the data is not commensurate in scope with the scope of the present claims. As set forth in MPEP 716.02(d), whether unexpected results are the result of unexpectedly improved results or a property not taught by the prior art, "objective evidence of nonobviousness must be commensurate in scope with the claims which the evidence is offered to support". In other words, the showing of unexpected results must be reviewed to see if the results occurred over the entire claim range, *In re Clements*, 622 F.2d 1029, 1036, 206 USPQ 289, 296 (CCPA 980). Applicants have not provided data to show that the unexpected results do in fact occur over the entire range claimed range of acid components.

It is noted that there does not appear to be any disclosure of the pH of either the inventive beverage or the comparative beverage and therefore it is not clear if the pH is commensurate in scope with the scope of the present claims or if there is proper side-by-side comparison between the beverages with respect to pH.

The data is not persuasive given that the results depend on the temperature and at certain temperatures, there is no difference between the present invention and the comparative invention, i.e. at 75 C and 1-10 minutes both beverages rate A. Given that the present claims are not limited to any particular time and temperature, the data is not persuasive.

Applicants argue that applicants are not required to compare the claimed invention with subject matter that does not exist in the prior art. However, Takahata is used to teach the use of gluconic acid or phosphoric acid. Applicants argue that the pH is in the claimed range. However it is not clear where the data shows the pH. Clarification is requested.

4. Applicant argues that the data shown in Table 4 of the specification regarding the composition comprising the acid group of gluconic acid and phosphoric acid is superior to other compositions in low pH and sensory test scores.

a. The data as presented in Table 4 show that compositions 5, 6 and 7 are very similar with respect to both pH and sensory test scores. In the absence of a sound statistical analysis of data, it does not seem that data regarding compositions 5, 6 and 7 are significantly different.

5. Applicant argues that Emoto (R6) does not disclose the combined use of citric acid, gluconic acid and phosphoric acid as recited in claims 1, 8 and 10.

a. Emoto discloses acids which are conventionally used in foods and drinks. Given this disclosure, phosphoric acid which is conventionally used in drinks is intrinsically

included. Furthermore, citric and gluconic acids are also disclosed by Emoto. Preferred embodiments and optimization of use of such acids is obvious to those of skill in the art.

6. Applicants argue that Emoto (R6) does not disclose, teach or suggest the use of a protein that does not coagulate at a pH of 3-4.

a. R6 discloses gelled foods and processes for producing such foods by employing gelling agents. It is true that that the emulsion produced by mixing lipids, saccharides, organic acids, emulsifying agents, gelling agents, and protein has an acidic pH equal to or close to the isoelectric point of the protein, however, a composite of an isoelectric gel of the protein and a gel formed with the gelling agents is obtained. Therefore, R6 is teaching and suggesting that a gelling agent may also be employed for the formation of the beverage gel. As a result it is obvious to one of skill in the art, that if a protein that does not coagulate at low pH is employed, a gelling agent can be used to impose the gelling properties of the gel beverage. On the other hand, employing protein hydrolysates which do not coagulate at low pH is obvious to the skilled artisans. Further, attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in fact situation of the instant case. At page 234, the Court stated as follows:

This court has taken the position that new recipes for formulas for cooking food which involves the addition or elimination on common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, on one else ever did the particular thing upon which the applicant asserts his right to a patent. In all

such cases, there is nothing patentable unless the applicant, by a proper showing, further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected and useful function. In re Benjamin D. White, 17 C.C.P.A. (Patents) 965, 39 F. 2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F. 2d 189, 70 USPQ 221.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HAMID R. BADR whose telephone number is (571)270-3455. The examiner can normally be reached on M-T 5:30 to 4:30 (Friday off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on (571) 272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Hamid R Badr
Examiner
Art Unit 1794

/Callie E. Shosho/
Supervisory Patent Examiner, Art Unit 1794